United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

TO BE ARGUED BY: Melvyn L. Cantor

74-2382 B

United States Court of Appeals

For the Second Circuit.

69 Civ. 442.

P/S

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellants-Appellees,

-against-

MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,

Defendants-Appellees.

On Appeal From the United States District Court For the Southern District of New York

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BRIEF OF DEFENDANT-APPELLANT-APPELLEE MARTIN E. SEGAL

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UNITED STATES COURT OF APPEALS

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BRIEF OF DEFENDANT-APPELLANT-APPELLEE MARTIN E. SEGAL

Preliminary Statement

Because of the subject matter of the present appeals, and the lengthy and complex nature of prior proceedings in this action, a brief description of the

history of the litigation might be helpful to the Court.

This action was commenced in February, 1969, pursuant to the provisions of Section 501 of the Labor Management Reporting and Disclosure Act (the "Act"), 29 U.S.C. Section 501. The defendants Joseph Curran and Shannon Wall were then officers of the National Maritime Union, and the defendant William Perry formerly had been the Assistant to the President of the union. The defendants Abraham E. Freedman, Leon Karchmer and Martin E. Segal were at that time the trustees of the National Maritime Union Officers' Pension Plan (the "Pension Plan"). Shortly after the action was commenced, some of the defendants (not including Mr. Segal* who had not yet been served with process) moved for summary judgment, and the plaintiffs cross-moved for summary judgment. Defendants' motions were denied. Plaintiffs' cross-motions were granted to the extent that the court below ruled that the Pension Plan improperly included as participants certain non-officer employees of the National Maritime Union (the "Union"). 302 F. Supp. 32 (S.D.N.Y. 1969). The defendants appealed from the entry

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* Mr. Segal served as a trustee of the Pension Plan from the Plan's inception and at all times relevant to this action.

of summary judgment and plaintiffs cross-appealed from certain other rulings made by the District Court subsequent to the entry of summary judgment.

In February, 1970, this Court issued its decision affirming Judge Bonsal's determination that the NMU constitution, as amended in 1960, did not permit the participation of non-officers in the Pension Plan, and remanded to the District Court for further proceedings. 423 F.2d 393 (2d Cir.), cert. denied, 399 U.S. 928, 400 U.S. 826 (1970).

After the remand and substantial discovery, a trial was held on August 23, 1971, solely to determine the amount of money to be returned by the Pension Fund to the Union treasury. On January 11, 1972, the Court below rendered its opinion setting that amount at $520,283.48. This judgment, with interest, has been satisfied. Also in its decision of January 11, 1972, the Court determined that the trustees of the Pension Plan had paid out to non-officers the amount of $371,271. The question of the personal liability, if any, of the defendants in connection with these payments to non-officers was set down for trial. Plaintiffs presented their evidence on the issue of personal liability on April 13, 14 and May 1, 1972, and, at the close of that

evidence, defendants moved to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

On June 29, 1972, Judge Bonsal granted the motions to dismiss as to all payments except that to William Perry ("Perry"). On July 12, 1972, certain of the defendants, including Mr. Segal, presented evidence of their good faith with regard to the Perry payment, and the matter was taken under submission by the Court.*

On October 26, 1972, Judge Bonsal rendered his opinion surcharging the defendant Abraham E. Freedman ("Freedman"), as a trustee of the Pension Plan, for the payment made to Perry, and dismissing the complaint as to all other defendants. 351 F. Supp. 775 (S.D.N.Y. 1972). In dicta in that opinion, Judge Bonsal commented that the other two trustees, Messrs. Karchmer and Segal, had acted "negligently" in relying on the opinion of counsel in making the Perry payment. 351 F. Supp. at 784. As dicta which had no bearing on the lower court's ultimate determination that both Messrs. Segal and Karchmer had acted in good faith and therefore were not subject to surcharge, Judge Bonsal's statement with respect to their

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* Mr. Segal also had presented evidence out of order, on April 14, 1972. This evidence was not considered in connection with the motion to dismiss.

"negligence" was not open to reversal on appeal. This Court's opinion and decision of June, 1973 is silent on this point, merely affirming the judgment of the court below dismissing the complaint against Messrs. Segal and Karchmer. 483 F.2d 480, 483-84 (2d Cir. 1973), cert. denied, 414 U.S. 1128 (1974).

On January 17, 1974, immediately after the Supreme Court denied their petition for a writ of certiorari, plaintiffs moved in the Court below, (Appendix II,* pp. 11a-13a), inter alia, for an order adjudging all defendants in contempt of the lower court's July 8, 1970 order (Appendix II, pp. 229a-230a) as to the source of counsel fees in the defense of this action. In an opinion dated May 1, 1974, Judge Bonsal found the plaintiffs' motion for a contempt citation to be baseless but, on his own motion, directed Messrs. Segal and Karchmer to reimburse the Pension Fund for the entire amount of their attorneys' fees paid by the Fund in connection with the defense of this action (Appendix II, pp. 73a, 79a-80a). The stated reason for this decision was the alleged negligence of Messrs. Segal and

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* "Appendix II" refers to the Joint Appendix filed on the present appeal. "Appendix I" refers to the Joint Appendix filed in connection with the prior appeal in this matter which resulted in this Court's June 1973 decision.

Karchmer in approving the Perry payment.

Messrs. Segal and Karchmer moved for reargument of that portion of the lower court's decision directing repayment to the Pension Plan of their attorneys' fees (Appendix II, pp. 84a-108a). On August 26, 1974, Judge Bonsal amended his decision of May 1, 1974, to the extent that Messrs. Segal and Karchmer were directed to reimburse the Fund for 39% of the total amount of their attorneys' fees paid by the Fund (Appendix II, pp. 147a-153a). This figure represented the portion of these attorneys' fees allocated to the defense of Messrs. Segal and Karchmer in connection with the Perry payment, as opposed to the numerous other issues in this litigation in which the Court below found no negligence on their part.

Judgment was entered on this decision on September 17, 1974 (Appendix II, pp. 154a-156a). Mr. Segal has appealed from so much of that judgment as directs him to reimburse the Fund for 39% of his attorneys' fees paid by the Plan and to bear 39% of all such fees incurred and to be incurred in this action since June 30, 1973.

STATEMENT OF THE ISSUES PRESENTED

1. Should not the Court below be reversed in its finding that a trustee of a pension plan was negligent in making a pension payment allowed by the Trust Agreement and in good faith reliance upon two separate opinions of counsel?

2. Even if the finding of negligence were warranted, is not a trustee of a pension plan who acted in accordance with the express terms of the Trust Agreement and in good faith reliance upon two separate opinions of counsel entitled to reimbursement for his attorneys' fees in the successful defense of a surcharge action?

3. Is not a defendant in a surcharge proceeding brought pursuant to Section 501 of the Act entitled to reimbursement for his legal fees in the successful defense of that action?

STATEMENT OF THE CASE

It should be noted initially that, whatever scant proof plaintiffs offered on the issue of surcharging Mr. Segal with respect to the Perry payment, plaintiffs never have contended that Mr. Segal was guilty of bad faith, either with respect to that payment or any of his

other activities as a trustee of the Pension Plan. The Court below has stated in dicta that Mr. Segal was negligent with regard to the Perry payment. 351 F. Supp. at 784. This assertion, we respectfully submit, is not supported by the evidence. In any event, as this Court affirmed, Mr. Segal's actions did not constitute a basis for liability under the Act or for surcharge under the Trust Agreement between the trustees of the Pension Plan and the Union. We respectfully submit that Mr. Segal's conduct also does not provide any basis for requiring him to reimburse the Pension Fund for attorneys' fees incurred in his successful defense of the plaintiffs' claims in this litigation.

A. The Trust Agreement

The Trust Agreement initially was entered into in December 1952, by and between the NMU, as settlor, and Herman E. Cooper (an attorney), Leon Karchmer and Mr. Segal, as trustees, 302 F. Supp. at 34. Throughout this proceeding, it has been conceded that, under the NMU constitution then in effect, the National Council of the NMU could have included as participants of the Pension Plan not only NMU officers, but also any and all other employees of the Union. See 302 F. Supp. at 34.

The National Council, however, evidently did not then desire to include such other employees of the Union in the Pension Plan. In 1960, the NMU constitution was amended. Judge Bonsal and two Judges of this Court agreed that the effect, if not the intent, of the 1960 amendment, as here relevant, was to remove from the National Council the power to include non-officers in the Pension Plan. 423 F.2d at 397-398.

In October 1961, more than seven years prior to the commencement of this litigation, the Trust Agreement was amended ("1961 amendment") to broaden the coverage of the Pension Plan to include the following categories of persons: "Union Representatives," defined as persons employed in the positions of "Assistant to the President" and "Organizer"; and, "Supervisory or Professional" employees of the Union occupying the positions of "Maintenance Supervisor," "Bookkeeping Supervisor," "Records and Supply Supervisor," "Executive Secretary," "Publicity Director and Editor of 'The Pilot'." 1961 amendment, Sections I.7, I.8 and I.9; 302 F. Supp. at 34. The 1961 amendment was signed by the appropriate officers of the Union and by each of the trustees, including, of course, Mr. Cooper, an attorney (Appendix I, pp. 949a-964a).

In September of 1964, the Trust Agreement again was amended ("1964 amendment") to broaden the coverage of the Pension Plan (Appendix I, pp. 965a-967a). Under this amendment, the Pension Plan also included:

> "All other employees of the union except (a) any employee whose compensation, hours of work or conditions of employment are determined by or with reference to a collective bargaining agreement, (b) any employee whose customary employment by the union is for not more than twenty (20) hours in any one week or for not more than five (5) months in any one calendar year, and (c) aliens employed in a foreign country."*

As is evident, far from being discriminatory, the 1961 and 1964 amendments to the Trust Agreement effectively brought under the coverage of the Pension Plan every full-time employee of the Union who was not otherwise covered by a collective bargaining agreement. Each of the amendments to the Trust Agreement, and each corresponding amendment to the Pension Plan, was approved by the Union membership (Appendix I, pp. 251a-252a). Moreover, the 1964 amendment evidently was occasioned, at least in part, by an Internal Revenue Service request that the Plan be so modified (Appendix I, pp. 444a-445a, 997a).

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* This amendment also was signed by the Union, and by each of the trustees, including Freedman, an attorney, who replaced Mr. Cooper as a trustee in 1963 (Appendix I, p. 967a).

B. The Perry Payment

Over the years, payments were made out of the Pension Fund. As noted above, the plaintiffs here complained almost exclusively of the payment made to William Perry and it is with respect to this payment alone that Messrs. Karchmer and Segal were held to be negligent.

Perry had become Assistant to the President of the NMU on or about August 12, 1958 (Appendix I, p. 885a). When the Pension Plan was amended in 1961 to include, inter alia, the position of Assistant to the President, Perry renewed his participation in the Plan.*

On or about August 2, 1966, Perry and the Union entered into an employment contract (Appendix I, pp. 800z-800cc), under which Perry was guaranteed employment until October 1974. Should his employment have been terminated prior to that date (as in fact happened), he was to receive all salary and other fringe benefits to which he otherwise would have been entitled. Mr. Segal was not involved at all in the negotiations regarding this contract (Appendix I, p. 694a).

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* Previously he had been a participant as a Patrolman of the Union (Appendix I, p. 885a).

This contract did not serve to bring Perry into the Pension Plan, for he was already included pursuant to the 1961 and 1964 amendments to the Trust Agreement. What the contract purported to do, however, was to guarantee Perry's inclusion in the Plan through October 1974, even should his employment be terminated prior to that date. The trustees therefore were asked to approve this agreement insofar as it related to the Pension Plan (Appendix I, p. 474a). Mr. Segal (and Mr. Karchmer) did approve the agreement, after receiving an opinion from Freedman's law firm as to its interpretation and validity (Appendix I, 898a-900a).*

In May 1968, the plaintiffs evidently sent a letter or letters to the Secretary-Treasurer of the Union, demanding that suit be brought to expel Perry and certain others from participation in the Pension Plan. Mr. Segal categorically denied having any knowledge of this letter (Appendix I, pp. 690a-691a) and Judge Bonsal found that there was no evidence that Mr. Segal was aware of it. 351 F. Supp. at 780, 784. We do not understand the plaintiffs to contend otherwise.

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* At all times, the Trust Agreement explicitly provided, in Section III.C.5, that the trustees "shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder. . ." Appendix I, pp. 954a-956a; and p. 18 n, infra.

Mr. Segal's first involvement with the actual payment to Perry was on January 16, 1969. Informed in the morning of that day that Perry was leaving the Union, Mr. Segal called Freedman to ascertain the appropriate length of credited service to which Perry was entitled (Appendix I, pp. 688a, 888a-889a).

At that time, Mr. Segal knew of no challenge to Perry's right to receive payment. Under the terms of the Pension Plan, Perry was entitled to apply as he did for a lump sum benefit. Indeed, most benefits paid under the Pension Plan were made in that manner (Appendix I, pp. 691a-692a). Mr. Segal's questions to Freedman, both in 1969 and previously in connection with Freedman's 1966 opinion, thus dealt only with how many years Perry was entitled to be credited (Appendix I, 688a-689a).

As noted, the Trust Agreement expressly provides that the trustees were authorized to rely on opinions of counsel, including counsel who was also a Trustee (Appendix I, p. 122a), and the Court below correctly found that Mr. Segal had done so in good faith in making the Perry payment. We respectfully submit that such a record presents no support for Judge Bonsal's dicta that

Mr. Segal was in any respect negligent in this payment.*

SUMMARY OF ARGUMENT

Mr. Segal submits that Judge Bonsal erred in his decision that Mr. Segal's actions pursuant to the explicit terms of the Trust Agreement and in good faith reliance on two separate opinions of counsel constitute negligence. Since this finding of negligence was a prerequisite to Judge Bonsal's direction that Mr. Segal must bear 39% of the attorneys' fees he has incurred in the successful defense of this litigation, that decision should be reversed.

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* Judge Bonsal evidently bottomed his finding of negligence on the speed with which Mr. Segal approved the Perry payment. However, as Mr. Segal testified, it was customary for him to approve pension applications promptly upon presentation to him by the administrators of the Fund (Appendix I, 696a-698a) and, given the facts that he had no knowledge of plaintiffs' contention that Perry was not properly a participant in the Plan, there was no reason for him to act differently in this instance. The only unusual aspect of the Perry application was the number of years credited to him, and as to this, Mr. Segal had received two separate opinions of counsel at the time he gave his approval. Moreover, since plaintiffs did not commence this action until some three weeks after the trustees approved Perry's application, it is difficult to see how any delay on Mr. Segal's part could have affected matters.

In the alternative, should this Court affirm Judge Bonsal's finding of negligence, Mr. Segal submits that, since his conduct did not result in liability under the Act or warrant surcharge at common law, he is entitled to reimbursement for his attorneys' fees in his successful defense of this litigation, as provided for in the Trust Agreement and in the applicable authorities.

POINT I

THE LOWER COURT ERRED AS A MATTER OF LAW IN FINDING MR. SEGAL NEGLIGENT WITH RESPECT TO THE PERRY PAYMENT

The Court below stated that Mr. Segal acted negligently in approving the Perry payment, even though that approval was in good faith and upon advice of counsel, and was given to a person designated in the Trust Agreement as a participant in the Pension Plan. Plaintiffs in this litigation do not even contend that Mr. Perry was not designated as a participant of the Pension Plan at the time he was paid. As a participant, he was entitled to the payment he received, assuming only that the Trust Agreement itself was lawful. It was only subsequent to the payment to Perry - and many years subsequent to the designation of

Perry as a participant of the Plan - that it was held that the Trust Agreement was void to the extent that it purported to include people such as Perry, who was not an "officer" as that term was defined in the NMU constitution.

The record is uncontradicted that Mr. Segal did not know at the time of the Perry payment, and did not have any reason to know, that the 1961 and 1964 amendments to the Trust Agreement were partially void. Indeed, in that respect the case here against Mr. Segal was even weaker than that in Newhouse v. Canal National Bank, 124 F. Supp. 239 (D. Me. 1954), a suit alleging breach of trust in a situation where trustees had, in good faith, paid moneys to certain bondholders that rightfully belonged to the beneficiaries of the trust. In Newhouse, one of the plaintiff beneficiaries had complained about ten years prior to commencement of the action of the payments to the bondholders and had even advised the trustees that he held a legal opinion to the effect that these payments were improper. However, he did not press the point and the Court was unwilling to impose liability upon the trustees based upon that

conversation. 124 F. Supp. at 244-45.*

Further, in the instant case, no proof whatever was offered that these amendments authorizing Perry's inclusion in the Plan were anything but arms-length agreements between the trustees and representatives of the Union who had, at the least, apparent authority to act on its behalf. There has never been even a hint of collusive wrongdoing by Mr. Segal. The amendments were approved by the Union membership (Appendix I, pp. 251a-252a) as well as by Mr. Cooper and Mr. Freedman, who were attorneys upon whose legal advice the trustees were

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* The Court in Newhouse also relied on the fact that plaintiffs had slept on their rights for more than ten years prior to commencing the action, during which time defendants had materially changed their position by continuing to make payments to the bondholders. 124 F. Supp. at 253. Similarly, plaintiffs did not commence this action until more than seven years after the 1961 amendments were approved by the Union membership and the Perry payment was made.

authorized to rely.* In addition, Mr. Segal twice conferred with counsel regarding the amount of the Perry payment: once in August 1966, when the Union entered into its contract with Perry; and once in January 1969, when Perry was paid.

Such good faith reliance on counsel cannot support a finding of negligence. In Dill v. Boston Safe Deposit & Trust Co., 343 Mass. 97, 175 N.E.2d 911 (1961), the Court considered the personal liability of

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* III.C.1. ". . . the Trustees shall have full and sole discretion to determine the amounts of such benefits and the terms and conditions of payment and shall have the power to conclusively determine all questions concerning the payment of benefits to any individual recipients or proposed recipients."

III.C.5. "The Trustees shall be protected in acting upon any paper or document believed by them to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund. No Trustee shall be liable for any action taken or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee." (Emphasis added.)

These provisions were repeated in Sections III.C.1 and III.C.5, respectively, of the Trust Agreement as amended in 1961 (Appendix I, pp. 954a-956a).

a trustee for an alleged premature distribution to one of the beneficiaries, which was made in reliance upon opinion of counsel. The trust agreement there contained an exoneration clause whose terms were substantially similar to those here. In Dill, the clause provided:

> "that the trustee 'shall be entitled to entitled to take the opinion of counsel . . . concerning any questions arising under this indenture or in any way relating to the trust fund or to . . . [its] duties in connection with the trust and in all such matters to act in accordance with the opinion or advice of such counsel. No [t]rustee shall be liable . . . for any default of any . . . attorney . . . selected with reasonable care but each [t]rustee shall be liable only for . . . its own individual acts or omissions in bad faith.'" 175 N.E.2d at 912 (Emphasis in original.)

There, the Court held that the trustee was entitled to rely upon an opinion of counsel and did not even reach the question whether the distribution was premature.* Indeed, this Court similarly stated in its June 1973 opinion with respect to the reliance on counsel by the defendants Curran and Wall, who, unlike Mr. Segal, had notice of plaintiffs' claims prior to the Perry payment:

> "In a matter such as this in which the issue is reasonably open to legal dispute an officer acting in good faith is justified in relying on counsel and is not liable, if he so acts, for breach of trust." 483 F.2d at 485.

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* See also: In re Joost's Estate, 50 Misc. 78, 100 N.Y.S. 378 378 (Surr. Ct. Kings Co. 1906), aff'd sub nom., In re Voelbel, 127 App. Div. 932, 110 N.Y.S. 1149 (2d Dept. 1909).

With respect to Mr. Segal, there is no evidence in the record that he had any reason even to question the legality of the amendments to the Trust Agreement prior to the commencement of the lawsuit (Appendix I, pp. 690a-691a 1215a). He further relied, in good faith, upon opinion of counsel as to the amount and manner of the Perry payment. Such circumstances compel the conclusion that the Court below erred, as a matter of law, in its decision that Mr. Segal was negligent.

POINT II

EVEN WERE THE COURT BELOW JUSTIFIED IN FINDING MR. SEGAL NEGLIGENT WITH RESPECT TO THE PERRY PAYMENT HIS SUCCESSFUL DEFENSE OF THIS ACTION REQUIRES REIMBURSEMENT FOR HIS ATTORNEYS' FEES

The Court below apparently reasoned that a trustee is not entitled to the reimbursement for expenses expressly provided for in a trust agreement,* when, in the defense of a lawsuit, the trustee is successful but the Court concludes that the institution of the suit (or, in

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* Section III.C.9 of the Trust Agreement provides that "The Trustees shall be empowered to obtain and determine compensation for legal counsel . . . as they may, in their discretion find necessary." (Appendix I, p. 958a)

this case, part of the suit) was the result of the conduct of that trustee. We respectfully submit that this conclusion has no basis in law and that the court below erred in not permitting Mr. Segal reimbursement by the Pension Fund for his expenses in the successful defense of this action.

A. Mr. Segal Has Been Cleared Of Any Violation Of The Act

Above all, it must be remembered that plaintiffs in this action claimed that the conduct of the defendants, including Mr. Segal, warranted surcharge under Section 501 of the Act. These allegations were successfully defended by Mr. Segal and the complaint against him was dismissed.

It is clear from all the authorities, including those erroneously relied upon by the Court below in its May 1, 1974 decision (Appendix II, pp. 78a-79a), that a successful defense to a Section 501 suit entitles the defendant to reimbursement of his attorneys' fees and disbursements. Thus, in Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962), this Court spoke of:

> "[A] policy of permitting a union to reimburse the defendant if he is successful in his defense, or perhaps even where his actions were based on a reasonable judgment as to appropriate procedures and do not evidence bad faith. . . ."

Similarly, in Koonce v. Gaier, 320 F. Supp. 1321, 1323-24 (S.D.N.Y. 1971), Judge Weinfeld stated the policy in the following terms:

> "If defendants' position is sustained, or even if it be found that their actions in refusing payment were based on reasonable judgment and were not inspired by bad faith, reimbursement may then be sought out of the Union treasury." [footnote omitted]

The policy expressed in the Holdeman and Koonce opinions has been unanimously adopted in other circuits as well. Thus, in Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972), the Court, citing Holdeman v. Sheldon, supra, stated at page 1277 that:

> "[T]he policy of permitting a union to reimburse its officers who have successfully defended themselves against charges of violating §501 provides adequate protection of union officers from baseless litigation."

In the Highway Truckdrivers and Helpers Local 107 v. Cohen litigation, union officers indicted (and ultimately convicted) for criminal wrongdoing, sought reimbursement of their legal fees in connection with the criminal proceedings. The courts noted on a number of occasions that, if the officers were exonerated from any wrongdoing in connection with the criminal proceeding, they could then appropriately seek reimbursement from the union. See 182 F. Supp. 608, 622 (E.D. Pa. 1960),

aff'd per curiam, 284 F.2d 162, 164 (3d Cir.), cert. denied, 365 U.S. 833 (1961); 215 F. Supp. 938, 941 (E.D. Pa. 1963), aff'd 334 F.2d 378 (3d Cir. 1964).

It is apparent from all of these authorities that, where a defendant is successful in a Section 501 suit, he is entitled to reimbursement of his attorneys' fees. The reason for this rule is readily apparent. The legislative history of the Act demonstrates that Titles I-VI were passed as a direct result of the findings made by the Senate Select Committee on Improper Activities in the Labor Management Field (commonly referred to as the "McClellan Committee"), of corruption, embezzlement, extortion and self-dealing on the part of certain union officials. It was against this background that the fiduciary responsibility amendment (which later became Section 501) was first proposed by Senator McClellan. The stated purpose of the amendment was to eliminate "pilfering, robbing, misusing and misappropriation" by union officials and to insure "that union officers who expend money shall not attempt, through indirect means, to pilfer a union treasury for their own benefit." 105 Cong. Rec. 5804-08, 5854-57 (daily ed. April 23, 1959), in II Legislative History of the LMRDA 1096-1100, 1128-1131 (1959).

In this case, there has been no suggestion that Mr. Segal engaged in "pilfering, robbing, misusing and misappropriation" of union funds or that he attempted "to pilfer a union treasury for [his] own benefit." In light of this total absence of allegation, let alone proof or finding, that Mr. Segal had in any way violated the spirit of Section 501, it is respectfully submitted that the authorities cited above mandate that Mr. Segal is entitled to reimbursement of his defense of this matter.

B. Nor Should This Result Vary At Common Law

The result is no different at common law. As recognized by this Court in its June 1973 opinion, the Trust Agreement provided that no trustee shall be held liable except for wilful misconduct, and Mr. Segal was not involved in any wilful misconduct. 483 F.2d at 483-484.

Since it is thus clear that the plaintiffs' claims in this action against Mr. Segal were without foundation and were properly dismissed, it follows that there should be no impediment to his being reimbursed for the expenses of defending this suit. A trustee's exoneration entitles him to reimbursement for such expenses as a necessary and proper expense to be borne

by the trust. This is all the more true where, as here, those expenses were incurred in defending a payment that was proper under the Trust Agreement as it then existed. As stated by Judge Hand in Weidlich v. Comley, 267 F.2d 133 (2d Cir. 1959):

> "When the trustee's administration of the assets is unjustifiably assailed it is a part of his duty to defend himself, for in so doing he is realizing the settler's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was part of the inducement to his acceptance of the burden of his duty. This has been uniformly the ruling, so far as we have found. Jessup v. Smith, 223 N.Y. 203, 207, 119 N.E. 403; Matter of Bishop's Will, 277 App. Div. 108, 98 N.Y.S. 2d 69; 301 N.Y. 498, 95 N.E. 2d 817; Gordon v. Guernsey, 316 Mass. 106, 55 N.E. 2d 27; Scott on Trusts §188.4." (Emphasis added.)

Any other ruling would make little sense, since it was incumbent upon Mr. Segal to seek vindication of his decision when it was challenged in the court below. To require Mr. Segal to assume substantial legal expenses for conduct which the court below erroneously considered negligent, although not surchargeable, is to overturn the express intent of the Trust Agreement as to the trustee's personal liability, and is thus reversible error.

CONCLUSION

There is perhaps one additional factor for this

Court to consider in determining whether it is proper to require Mr. Segal to bear a portion of his legal fees in this matter. This case is but one of many filed by these plaintiffs or other disenchanted members of the Union, basically seeking to reorganize the power structure of the Union, (See, Morrissey v. Curran (II), 73 Civ. 204 (S.D.N.Y.); Wimbush v. Curran, 73 Civ. 937 (S.D.N.Y.). Cf. Wirtz v. National Maritime Union, 284 F.Supp. 47 (S.D.N.Y.), affirmed 399 F.2d 544 (2d Cir. 1968).) Mr. Segal, in his capacity as an "outside trustee" of the Pension Plan, has been dragged into this and certain of the other actions although he contributed little, if anything, to plaintiffs' grievances and plaintiffs have conspicuously avoided attributing any bad motive to any of his conduct as a trustee. Mr. Segal respectfully submits that, not only under the applicable authorities cited above, but also as a matter of fundamental fairness, he should not be asked to bear any portion of the expenses he incurred while defending himself in a dispute to which he was not really a party.

Respectfully submitted,

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Text of 29 U.S.C. §501

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel

prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

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Leon Kaufman, Defendant-Appellant-Appellee
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Margaret Fleming,
Secy

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12:15 PM Bronson, Gansserman, Allen & Wayne
Attorneys for Curran & Wall
Defendants-Appellees

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